BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	**CS Docket No. 01-129**
Competition in Markets for the	)	
Delivery of Video Programming	)	
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	)	

To: The Commission

COMMENTS OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Summary

Due to technological improvements, a full analysis of video competition should include an assessment of the progress of broadband Internet deployment in rural America. While some rural areas may be well connected, most still lack access to the same telecommunications infrastructure and technologies enjoyed by those living in urban areas. As video and Internet technologies converge, progressively faster broadband services will become increasingly important to the economic and social well being of rural America.

To evaluate the status of competition to cable in rural areas, the Commission needs to verify the actual percentage of "Homes Passed" by cable. For seven years, the Commission has generally accepted the cable industry's claim that cable service is available to approximately 97% of homes throughout the country. Widespread acceptance of this flawed figure has unfairly influenced key policy decisions affecting rural America.

In April of 2000, the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") found that the percentage of Homes Passed by cable may be as low as 81%. The disparity is even more pronounced in many individual states with significant rural populations, where as few as 50-70% of homes may have access to cable.

Without access to cable, many rural homes cannot receive local television service or High-Speed Internet. Local service is critically import to the safety, health and economic viability of every local community in the country. Communities without effective local coverage are severely disadvantaged in attracting and maintaining residents and businesses.

Due to its ubiquitous nature and inherent efficiency, satellite distribution technology represents the best option available to provide both local service and High-Speed Internet access to less populated, more remote areas with difficult geographic terrain. Market forces alone, however, will not guarantee that rural Americans will have access to these services via satellite.

The provision of local satellite signals in smaller markets is not likely to generate enough profit to satisfy publicly traded corporations. Further, the satellite "must carry" requirements (whereby all local signals must be carried if any one signal is carried) will compound the problem. A new, not-for-profit approach involving local businesses with a strong presence and history of service in their communities will be required to provide local programming by satellite to all of rural America.

Pursuant to the recently enacted "Launching Our Communities' Access to Local Television Act of 2000" (the "LOCAL Act"), loan guarantees up to 80% of $1.25 billion of loans will become available to facilitate the delivery of local broadcast signals to households located in nonserved and underserved areas. As an advisor to the Local Television Loan Guarantee Board implementing the LOCAL Act, the Commission should vigorously advocate the provision of local service throughout all of rural America.

Although terrestrial operations in the Direct Broadcast Satellite ("DBS") band may offer opportunities to bring local service to rural America, NRTC urges the Commission to exercise caution in evaluating the serious interference issues associated with the Multichannel Video Distribution and Data Service ("MVDDS"). If MVDDS can be implemented safely in the DBS band, the Commission should ensure that all MVDDS applicants have a full and fair opportunity to participate in providing this new service.

The Commission should take all steps necessary to extend its Program Access rules. The rules were essential to the initial development of DBS and are necessary to allow the continued growth of DBS as a competitive force to cable. Vertically integrated cable programmers should not be permitted to evade the Program Access rules simply by switching program delivery technologies from satellite to terrestrial.

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Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission ("Commission" or "FCC"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Comments in response to the Notice of Inquiry ("NOI") issued by the Commission in the above-captioned proceeding on June 25, 2001.[1] NRTC remains concerned that the Commission's rules and policies continue to prevent consumers, especially those in rural areas, from enjoying the full benefits of a competitive Multichannel Video Programming Distribution ("MVPD") market. NRTC encourages the Commission to take action necessary to ensure that all Americans – regardless of their geographic location – benefit from advances in MVPD technology.

I. Background.

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located

[1] Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (Released June 25, 2001).

throughout 46 states. Since its founding in 1986, NRTC's mission has been to provide much needed telecommunications technologies to rural America. In furtherance of its mission, NRTC assisted in capitalizing the launch of the DIRECTV satellite business in 1994 through a DBS Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest). In return, NRTC received program distribution and other rights to market and distribute DIRECTV programming services to large portions of rural America. NRTC, its members and affiliates currently market and distribute DIRECTV programming to more than 1,800,000 rural households using DBS technology. NRTC also distributes C-band satellite programming to some 25,000 subscribers. Additionally, NRTC recently entered into agreements with StarBand Communications and Hughes Network Systems, Inc. to deliver broadband Internet service by satellite to rural America.

2. During the 15 years since its inception, NRTC has participated extensively in Congressional deliberations and Commission and Copyright Office proceedings to ensure that rural America receives the same access to programming that is available in more populated urban areas. As satellite technology has developed and flourished, NRTC has urged the rapid development of competition in providing rural consumers with choices in video program delivery. During each of the previous seven years when the FCC has reported to Congress on the status of competition in markets for the delivery of video programming, NRTC has filed Comments and Reply Comments consistently urging the Commission to promote competition and a diversity of advanced video services for rural America.

II. Comments

A. Access to High-Speed Internet Services will Become an Important Component of Video Competition as Broadband Technologies Improve.

3. The Commission's analysis of video competition should assess the development of rural broadband Internet services. The two issues will continue to converge as Internet technologies available to urban and rural areas advance. Streaming media today are at an early stage of consumer acceptance. Progressively faster broadband services will support specialized streaming video materials aimed at consumers and businesses, including rural businesses. Broadband networks must be available in rural areas in order for this competition to develop.

4. Dial-up Internet subscribers already access hundreds of radio stations worldwide through streaming services on the Worldwide Web. Video, such as movie trailers, the FCC's live and recorded meetings, and interactive video conferences, also is becoming commonplace on the Web. Some research suggests that the ability to view higher-quality streaming video is one of the primary motivations for subscribing to broadband services.

5. In a recent interview, Larry Roberts, the chief scientist of the Advanced Research Projects Agency in the 1960s during the development of the ARPANET, said: "I think you'll immediately start seeing streaming audio and video take off in business activities, because more and more businesses are being connected at very high bandwidth. There's a lot of high-bandwidth stuff going on in business, and almost all the business-related connections are at least a T-1 connection."[2]

6. These types of high-speed, interactive video tools are exactly what rural communities need to promote economic development. The National Telecommunications and Information

[2] Kerschbaumer, Ken, *The Next Big Thing: One of the Internet's Founding Fathers Shares His Thoughts About the Emergence of Streaming Technology*, Broadcasting & Cable, Dec. 11, 2000.

Administration ("NTIA") has concluded, however, that rural areas are now lagging behind central cities and urban areas in broadband penetration.[3] Similarly, the Texas Public Utilities Commission recently reported, "High-speed access to the Internet is increasingly seen as critical to Texas' economic development, especially in rural Texas. While some rural areas may be well connected, most still lack access to the same telecommunications infrastructure or technologies enjoyed by those living in urban areas."[4] This statement could easily apply to all states.

7. Broadband technology allows individuals to choose where they want to live, instead of dictating where they have to live. Video conferencing and other advanced services available over broadband networks will be among the most important telecommuting tools available to businesses when they determine whether to locate in rural communities.

8. Rural subscribers today can access streaming video over Ku-band satellite Internet services at data rates up to 400 kbps downstream, which provides significantly superior quality when compared to streaming media from dial-up or ISDN lines. In addition, rural viewers can receive combined DBS video and High-Speed satellite Internet services over the same dish.

9. Satellite Internet can reach any home with electricity that has a clear view of the southern sky. The 21 x 36-inch and 24 x 36-inch dishes commonly used for two-way Ku-band Internet service are somewhat larger than dishes for TV-only service. NRTC applauds the Commission's recent ruling extending its antenna preemption rules to include both DBS and

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[3] *Falling Through The Net: Toward Digital Inclusion; A Report on Americans' Access to Technology Tools*, October 2000, pg. xviii (noting that rural areas are "lagging behind" urban areas for broadband services with penetration rates of 7.3% for rural areas compared to 12.2% for central cities and 11.8% for urban areas).

[4] Report to the 77th Legislature on Advanced Services in Rural and High Cost Areas, Texas Public Utility Commission (PUC), January 2001.

fixed wireless signals via satellite.[5] A rural resident who orders satellite Internet can ask the installer to mount one or two additional video down-converters on the satellite arm to enable combined TV/High-Speed Internet service.

10. NRTC has entered into distribution agreements with StarBand Communications, Inc., and Hughes Network Systems, the two Ku-band carriers that currently offer High-Speed Internet via satellite to North America. Through its member cooperatives, NRTC will offer DBS/Internet service to rural America later this year.

11. Next-generation Ka-band (frequencies near 18 GHz) technologies offer the same video/broadband capabilities, only at much faster speeds. WildBlue Communications Inc., for example, is a Ka-band service provider that plans to offer satellite service at 3 Mbps downstream/400 kbps upstream in 2002. In the following years, other carriers plan to launch even faster satellite data services. Continually improving upstream speeds, compared to 128 kbps for current Ku-band systems, could encourage rural subscribers to access interactive video services.

12. While satellite technology is the most effective way to reach remote areas of the country, we recognize landline technologies will compete with satellite Internet/video in many rural areas. Several Silicon Valley companies and other technology developers worldwide already offer IP-based digital head end systems that eventually will support combined video-on-demand/High-Speed Internet services over broadband copper, fiber and hybrid fiber coaxial

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[5] First Report And Order And Further Notice Of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. (Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services)*, 22 CR 1, ¶6 (October 25, 2000) (prior to the Commission's Order, 47 C.F.R. § 1.4000 applied only to consumers receiving signals from television broadcasters, direct broadcast satellite services, and multichannel multipoint distribution services.).

infrastructures. It is very likely that a multifaceted approach will be needed to ensure rural Americans are fully served.

B. To Evaluate the Status of Competition to Cable, the Commission First Needs to Verify the Percentage of Homes Passed by Cable.

13. In each of the last seven years, the Commission has issued an Annual Report describing the competitive status of markets for the delivery of video programming.[6] One of the foundations of these Annual Reports – the most widely used measurement of cable availability – is the number of Homes Passed by cable.[7]

1. In Previous Cable Competition Reports, the Commission has Simply Accepted the Cable Industry's Claim that 97% of Homes are Passed by Cable.

14. By accepting in previous Annual Reports the cable industry's unrealistically high rate of 97% Homes Passed, the magnitude of cable's availability has been vastly inflated -- and the problem of access to advanced telecommunications services in areas unserved by cable has been downplayed.[8] NRTC urges the Commission to independently verify the actual percentage of Homes Passed by cable.

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[6] See, Communications Act of 1934, as amended, 47 U.S.C. §548(g).

[7] "Homes Passed" is defined as the total number of households capable of receiving cable television service (See, Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, 2001 FCC LEXIS 98, FCC 01-1, n. 12 (Released January 8, 2001) (stating that 96.6% of homes were passed by cable) ("Seventh Report")).

[8] See, First Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7451, ¶18 (stating that 96% of homes were passed by cable); See, Third Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4368, ¶13 (stating that 96.7% of homes were passed by cable); See, Fourth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 1034, ¶14 (stating that 97.1% of homes were passed by cable); See Also, Fifth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284, ¶16 (stating that 96.5% of homes were passed by cable); See Also, Sixth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶19 (stating that 96.6% of homes were passed by cable); And See, Seventh Report, ¶18 (stating that 96.6% of homes were passed by cable).

2. The NTIA and RUS Concluded that the Number of Homes Passed may be far less than 97%.

15. As NRTC mentioned in its comments last year, a joint report released in April of 2000 by NTIA and the Rural Utilities Service ("RUS"), entitled *Advanced Telecommunications in Rural America: the Challenge of Bringing Broadband Service to All Americans* ("NTIA/RUS Report"), questions the manner in which the percentage of cable Homes Passed has typically been calculated.[9] The NTIA/RUS Report discusses apparent flaws with the cable industry's long-standing numbers and suggests remedies for a more accurate determination.

16. As the NTIA/RUS Report points out, the calculation of cable passage rates can be dramatically impacted by three basic, different sets of statistics: 1) Housing Units; 2) Households; and 3) TV Households. A "Housing Unit" is defined as a house, apartment, mobile home, group of rooms, or single room, that is occupied (or, if vacant, is intended for occupancy) as separate living quarters.[10] A "Household" is a currently occupied "Housing Unit."[11] A "TV Household" is defined as a home with at least one television.[12] The Table below (not to scale) illustrates the relationship between these groups as well as their current estimates:[13]

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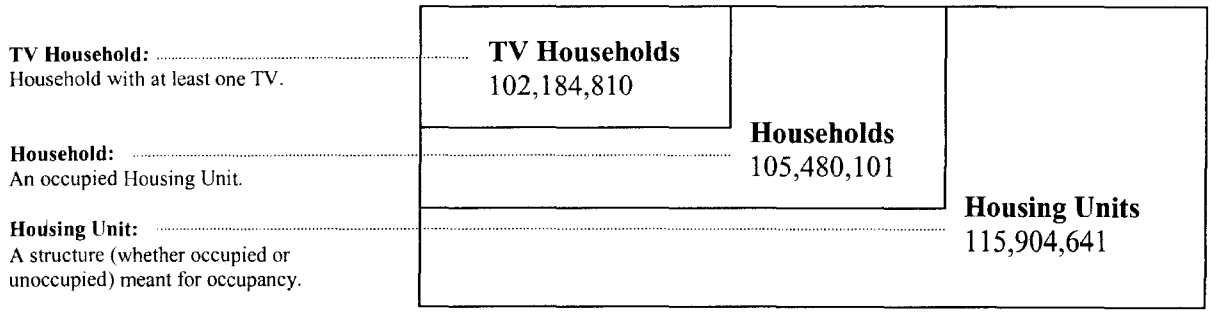
[9] See, National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*, April, 2000; And See, Comments of the National Rural Telecommunications Cooperative, CS Docket No. 00-132, ¶¶8-15 (submitted September 8, 2000).

[10] See, U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing*, at A-2 (Released May 2001) ("2000 Census Report").

[11] Id.

[12] Seventh Report, at ¶18.

[13] The numbers for Housing Units and Households are based on numbers provided by the U.S. Census Bureau (See, 2000 Census Report, pg. 1). The number for TV Households is based upon information contained in the National Cable & Telecommunications Association web site, (visited August 3, 2001), *Industry Statistics*, < http://www.ncta.com/industry_overview/indStats.cfm?indOverviewID=2> ("NCTA National Web Site").



17. In arriving at the 97% figure, the NTIA/RUS Report suggests that the cable industry may by comparing "apples to oranges," by counting Housing Units -- not TV Households-- as a percentage of TV Households.[14] The NTIA/RUS Report points out that when a cable provider does not serve a house, it "has no easy way to distinguish among a household without a TV, a household with a TV, or an unoccupied housing unit."[15] The cable provider knows only that a Housing Unit is passed. The NTIA/RUS Report concludes, therefore, that a comparison of Homes Passed to Housing Units is "especially useful" in determining cable passage rates.[16]

18. When comparing Homes Passed to the total number of Housing Units (as depicted below), the NTIA/RUS Report shows that based on then available data the percentage of Homes Passed by cable dropped sharply from 97% to as low as 81%.[17]

Cable Industry:	**TV Households (including Housing Units) Passed/ TV Households = 97%[18]**
NTIA/RUS:	**Housing Units Passed/Housing Units = 81%**

[14] NTIA/RUS Report, at n. 62.

[15] Id

[16] Id.

[17] Id, at n. 62. Using updated numbers from the 2000 Census Report and the NCTA National Web Site, the current passage rate ranges from **95.6%** (Homes Passed (97,700,000) divided by the total number of TV Households (102,184,810)) to **84.3%** (Homes Passed (97,700,000) divided by the total number of Housing Units (115,904,641)). NCTA still posts a **96.7%** passage rate on its NCTA National Web Site.

[18] The percentage dropped to **92%** when numbers developed by the Warren Report rather than Paul Kagan Associates, Inc. were used. Id.

19. Even if Households were used as the basis for the calculation (rather than Housing Units), the NTIA/RUS Report found that the Homes Passed rate could be as low as 90%:

NTIA/RUS: Households Passed/Households = 90%[19]

20. As shown below, the cable industry's numbers cannot be reconciled with the Census Bureau's numbers: the cable industry claims far more Homes Passed in some states than the Census Bureau even reports as Households:

Census Bureau Households vs. Cable Homes Passed

	The Census Bureau reports the existence of the following number of **Households**:[20]	The Cable Industry reports a *greater* number of **Homes Passed**:[21]
Arizona	1,901,327	2,178,695
Connecticut	1,301,670	1,440,019
Washington, DC	248,338	319,034
Hawaii	403,240	410,195
Illinois	4,591,779	4,633,495
New Jersey	3,064,645	3,726,812

21. When analyzed on a state-by-state rather than national basis (using either Households *or* Housing Units), the disparity of the problem is even more pronounced in individual states with significant rural populations:

[19] NTIA/RUS Report, n.62. Households are already used by the Commission as a benchmark for identifying cable systems which are subject to effective competition and thereby exempt from rate regulation See, 47 U.S.C. §543(l)(1)(A); And See, 47 C.F.R. §76.905(b)(1); 47 C.F.R. §76.905(c).

[20] 2000 Census Report, at 1028, 1032, 1034, 1037, 1039, 1056.

[21] See, National Cable & Telecommunications Association web site, (visited August 3, 2001), <http://www.ncta.com/industry_overview/indStats.cfm?statID=16> ("NCTA State Web Site").

Homes Passed vs. Households and Housing Units in Certain States

States	Homes Passed[22]	Households[23]	Cable Passage Rate Using Households[24]	Housing Units[25]	Cable Passage Rate Using Housing Units[26]
Alaska	172,041	221,600	77.64%	260,978	65.92%
Idaho	334,312	469,645	71.18%	527,824	63.34%
Kansas	877,368	1,037,891	84.53%	1,131,200	77.56%
Kentucky	1,156,794	1,590,647	72.72%	1,750,927	66.07%
Maine	436,509	518,200	84.24%	651,901	66.96%
Minnesota	1,528,769	1,895,127	80.67%	2,065,946	74.00%
Mississippi	575,436	1,046,434	54.99%	1,161,953	49.52%
Montana	219,085	358,667	61.08%	412,633	53.09%
Nevada	669,438	751,165	89.12%	827,457	80.90%
New Hampshire	397,473	474,606	83.75%	547,024	72.66%
New Mexico	497,037	677,971	73.31%	780,579	63.68%
North Dakota	201,847	257,152	78.49%	289,677	69.68%
South Dakota	174,867	290,245	60.25%	323,208	54.10%
Utah	391,172	701,281	55.78%	768,594	50.89%
Vermont	156,174	240,634	64.90%	294,382	53.05%
West Virginia	642,550	736,481	87.25%	844,623	76.08%
Wyoming	145,136	193,608	74.96%	223,854	64.84%
Totals	8,576,008	11,461,354	74.83%	12,862,760	66.67%

In these particular states, cable services are available to far less than 97% of homes. On average, the percentage of homes passed by cable in these states is roughly only 75% (using Households) or 67% (using Housing Units).

22. Widespread acceptance of the flawed 97% Homes Passed number has unfairly depicted the state of video competition in rural America. This inaccurate number has created the understandable but false impression throughout the Government and elsewhere that "*there is*

[22] See, NCTA State Web Site.

[23] 2000 Census Report, 1026 - 1076.

[24] Determined by dividing the number of Homes Passed by the number of Households.

[25] 2000 Census Report, 1026 - 1076.

[26] Determined by dividing the number of Homes Passed by the number of Housing Units.

competition, and there are services available, cable in 97 percent of the households, large areas of the country ... 97 percent of (consumers) have the ability to subscribe to cable."[27]

C. The Commission Should Address the lack of Local Television Service in Rural America.

23. In a recent report to Congress, the FCC acknowledged that rural areas have less access to local broadcast stations delivered over cable than is found in cities and towns.[28] The Commission recognized that this was due to the fact that it is more costly to deploy cable over large rural areas, and the subscriber base is smaller and more widely dispersed.

24. Access to local broadcast signals is not just about the delivery of entertainment programming. To the contrary, it is an issue of critical importance to the safety, health, and economic viability of each and every local community in the country.[29]

25. The implementation of local service throughout the country will assist in protecting the lives of rural Americans, by encouraging the delivery of critical information – such as weather and disaster broadcasting – to rural as well as urban areas.[30] In any natural disaster situation, local news provides vital information on safety procedures, emergency shelter location and how to obtain much needed assistance. This type of local information – whether a news

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[27] The Rural Local Broadcast Signal Act: Hearings on H.R. 3615, Before the Subcommittee on Telecommunications, Trade, and Consumer Protection, of the Committee on Commerce, 106th Cong. 16, (2000) (statement of Mr. Dan Crippen, Director, Congressional Budget Office, emphasis added).

[28] See, *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454, at ¶30 (Released January 2, 2001)

[29] See, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 98-187 (Released Aug. 7, 1998), at ¶5; And See, *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report, FCC 99-238 (Released Nov. 5, 1999), at ¶317.

[30] See, *Hearings on The Loan Guarantee Program to Promote The Delivery of Direct-To-Home Satellite Services to Rural America Before The Subcommittee on Department Operations, Oversight, Nutrition, And Forestry of The House Committee on Agriculture*, 106th Cong. 106-41, (2000) ("*Loan Guarantee Hearing*") (Statement of Hon. Robert Goodlatte, Representative in Congress From The State of Virginia).

broadcast, an emergency management announcement or a weather update – helps to protect lives and property.

26. The coverage of news, sports, community affairs and other local events also is essential to the social and economic well being of any local community. Communities without effective local coverage of important events are severely disadvantaged both in building a sense of community spirit and in attracting and maintaining residents and businesses. Without effective local coverage, any community will be viewed as a less desirable place within which to live and do business.

1. Satellite Technology Offers the Greatest Potential to Provide Local Service and High-Speed Internet Access Throughout Rural America.

27. Due to its ubiquitous nature and inherent efficiency, satellite distribution technology represents the best option available to provide local service and High-Speed Internet Access throughout all of rural America. Satellite technology is uniquely situated for less populated, more remote areas with difficult geographic terrain. Unlike other technologies, satellite is not sensitive to long distances. It can cover wide, remote spaces that ground-based technologies cannot be expected to cover.

28. It is no coincidence that satellite TV penetration rates are higher in rural America than in urban parts of the country.[31] At a fraction of the investment per subscriber, satellites can reach where cable and other terrestrial technologies are not likely to be available or cost-

[31] See, Skytrends Report, March 2000, p. 6-7.

effective.[32] Satellite technology clearly presents the best opportunity to offer widespread local TV service and High-Speed Internet Access to vast unserved portions of the country.

2. The Loan Guarantee Program Administered by RUS with Commission Input is Essential to Ensure Delivery of Local Service in Rural America.

29. The "Launching Our Communities' Access to Local Television Act of 2000," (the "LOCAL Act") was enacted on December 21, 2000.[33] The LOCAL Act provides for the establishment of the Local Television Loan Guarantee Board (the "Board"), which consists of the Secretaries of Agriculture, Treasury, Commerce, and the Chair of the Board of Governors of the Federal Reserve System, or their designees.[34] The Board may approve loan guarantees up to 80% of $1.25 billion of loans to facilitate access to signals of local television stations for households located in nonserved and underserved areas.[35] The LOCAL Act calls for additional consideration to projects that will offer High-Speed Internet service.[36] The RUS is the administrative agency responsible for implementing the provisions of the LOCAL Act, and the Commission has been designated as a consultant to the Board.[37]

30. NRTC participated in Congressional deliberations leading to enactment of the LOCAL Act and is working with the RUS in formulating regulations to implement the Act. NRTC urges the Commission to become actively involved in achieving the goals of the LOCAL Act through its advisory capacity with the Board.

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[32] Although subscribers must have a clear line of sight to the satellite and exposure to the southern horizon, these restrictions are not as limiting as is the case with terrestrial based technologies.

[33] *The Launching Our Communities' Access to Local Television Act of 2000*, Pub. L. No. 106-553, (2000).

[34] Id. at §1003(b)(1).

[35] Id. at §1002, §§1004(f)(1), (2).

[36] See, LOCAL Act, §1004 (e)(1)(B).

[37] Id. at §1003(c)(2)(A).

31. The two nationwide DBS providers, DIRECTV and EchoStar, do not to provide local television service to significant portions of rural America. As the Commission acknowledged earlier this year in its report to Congress concerning the availability of local broadcast signals, a combined total of only 40 of 210 Designated Market Areas ("DMAs") were then being served by EchoStar and DIRECTV.[38] Currently, only 42 DMAs are being served.[39]

32. The provision of local signals in smaller, rural markets is not likely to generate enough profit to satisfy publicly traded corporations. Without a sufficient return on their investment, current satellite providers are unwilling to devote adequate satellite transponder capacity to the provision of local signals.

33. The authors of the LOCAL Act recognized this problem. They concluded that government support in the form of enhanced availability of private capital and a lower interest rate was necessary to serve the broader public purpose of delivering local television signals to rural markets. A not-for-profit approach combining the benefits of the rural loan guarantee program with the skills and expertise of local businesses with a history of service in their communities will be required to bring local service by satellite to all of rural America.[40]

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[38] See, *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454, at ¶16 (Released January 2, 2001).

[39] See, DIRECTV, *Enjoy Local Channels in Digital-Quality Picture and Sound!* (visited July 30, 2001), <http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html>; See Also, EchoStar, *Locals On Dish Network* (visited July 30, 2001), <http://www.dishnetwork.com/content/programming/locals/index.shtm>.

[40] See, Joint *Comments of the National Rural Telecommunications Cooperative, the National Rural Electric Cooperative Association and the National Rural Utilities Cooperative Finance Corporation*, Request for Public Comment and Notice of Public Discussion Meetings On Implementing the Provisions of The Launching Our Communities' Access to Local Television Act of 2000, Public Law 106-553, Before the Rural Utilities Service, Department of Agriculture (April 13, 2001).

D. Satellite Must-Carry Requirements may Limit the Availability of Local Satellite Signals in Rural America.

34. Compounding the financial disincentives in providing local signals to rural America are capacity constraints and the statutory "must-carry" requirements.[41] By January 1, 2002, satellite carriers must carry upon request all local broadcast station signals in local markets in which at least one broadcast signal is carried pursuant to Section 122 of Title 17, United States Code.[42]

35. There currently is not enough Ku-band DBS satellite capacity to provide all local signals in all local markets in rural America.[43] The problem could grow deeper if the Commission decides to apply satellite must-carry provisions to local HDTV signals, as it is currently considering.[44] If DBS carriers begin offering local broadcasters' full-quality HDTV, rural viewers should have access to those signals. Improvement in the quality of a signal, however, generally will consume additional bandwidth and will reduce the overall amount of transponder capacity remaining on the satellite. In order to provide the same number of

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[41] Section 338(a)(1) of the Communications Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), provides that after December 31, 2001:

each satellite carrier providing [television broadcast signals under the compulsory copyright licensing system] to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) [retransmission consent requirement]. See, 47 U.S.C.A. §338(a)(1).

[42] Pursuant to the SHVIA, the FCC adopted rules implementing this carriage requirement by November 29, 2000. An appeal of the provisions of the must-carry requirements is currently pending at the U.S. Court of Appeals for the Fourth Circuit (See, *Satellite Broadcasting and Communications Association, et al v. FCC, et al*, No. 01-1151 (4th Cir. filed 2/2/01)).

[43] See, *Hearings on Cable and Video: Competitive Choices, Before The Subcommittee on Antitrust, Business Rights, And Competition Senate Committee on The Judiciary*, 107th Congress, (April 4, 2001) (Statement of Eddy W. Hartenstein, Corporate Senior Executive Vice President, Consumer Sector, Hughes Electronics Corporation And Chairman, DIRECTV Global) ("*Hartenstein Testimony*").

[44] See, First Report And Order And Further Notice Of Proposed Rule Rulemaking, *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 22 CR 1243, 16 FCC Rcd 2598, 66 FR 16524, 65 FR 16533 (January 23, 2001).

channels, full-quality HDTV will require more bandwidth and spectrum than lower-quality signals.

36. Although NRTC does not question the underlying purpose of the must-carry rules, current satellite carriers may well provide no local signals in lower-population, lower-profit markets if they are required to carry all signals in these markets. As a result, "must-carry" could mean "no carry" in rural America.[45]

E. The Commission Should Review the Impact of the Distant Network Signal Rules on Programming Choices in Rural America.

37. Court decisions applying restrictions contained in the copyright laws have caused many rural consumers to lose access to their distant network signals at the same time they are being denied access to local signals by satellite.[46] The receipt of distant network signals by many satellite consumers has been challenged by local broadcasters under the SHVIA. Further, the grand-fathering provisions of the SHVIA, whereby certain preexisting subscribers are permitted to continue receiving distant network service, are scheduled to expire on December 31, 2004.[47]

38. The loss of distant network signals in combination with the unavailability of local signals could severely restrict programming choices in rural America. NRTC urges the Commission to review the status of the distant network signal rules, to ensure that programming choices in rural America are not unduly impacted.

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[45] See, *Hartenstein Testimony.*

[46] See, NRTC Emergency Petition for Rulemaking, *In The Matter of Definition of Over-The-Air Signal of Grade B Intensity For Purposes of The Satellite Home Viewer Act*, Rm. No. 9335, pp. ii, 9 (July 8, 1998); See e.g., *CBS Inc., et al. v. PrimeTime24 Joint Venture*, 9 F.Supp. 2d 1333 (S.D. FL. May 13, 1998).

[47] 17 U.S.C.A. §119(e).

F. If Terrestrial Services are Permitted in the Ku-band, the Commission Should open a Filing Window, Accept Competing Applications and Conduct an Auction.

39. In January 2001, the Commission conditionally approved the terrestrial use of the Ku-band for the newly established Multichannel Video Distribution and Data Service ("MVDDS").[48] The MVDDS is a fixed terrestrial multichannel service developed for the retransmission of video and data signals, including local television.[49]

40. Northpoint Technology, Ltd. ("Northpoint") proposes to share the 12.2-12.7 GHz band with DBS operations through the use of southward pointing transmitting and northward pointing receiving antennas. The Commission has acknowledged that MVDDS could serve as an additional source of competition to cable and other video delivery services.[50]

41. Serious questions have arisen, however, concerning the interference potential to DBS operations as a result of terrestrial use of the DBS band. A recent independent analysis conducted by the MITRE Corporation at the direction of Congress concluded that, "MVDDS sharing of the 12.2–12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation in many realistic operational situations."[51]

42. Although terrestrial operations in the DBS band may offer opportunities to bring local service to rural America, NRTC urges the Commission to exercise extreme caution in

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[48] See, *In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245; FCC 00-418, Federal Register, Volume 66, Number 16, pgs. 7607-7613, (Released January 24, 2001) ("the Northpoint Order").

[49] See, Northpoint Order, ¶4.

[50] Northpoint Order, ¶228 (stating that MVDDS operations will deliver competition to other video distribution and data services and offer localized service that may not be possible through other services.).

[51] MITRE Technical Report, *Analysis of Potential MVDDS Interference to DBS in the 12.2–12.7 GHz Band*, The MITRE Corporation, pg. 6-1 (April 2001).

evaluating the interference issues that may be associated with MVDDS. Existing DBS operations in this band must be protected before any type of MVDDS is authorized.

43. If MVDDS can be implemented safely in the DBS band, the Commission should ensure that all would-be applicants have a full and fair opportunity to participate in providing these types of services. By establishing an unambiguous Application Filing Window, accepting competing applications and conducting an auction, the Commission will maximize the public interest benefits inherent in the MVDDS. All applicants will have an opportunity to participate in providing this new service, the American taxpayers will receive compensation for the use of this valuable spectrum, and rural America will be the beneficiary of a diversity of programming sources. In that manner, the Commission will promote the utilization and development of these frequencies throughout the country and ensure effective competition in the video distribution market.

G. The Commission Should Extend the Expiration date of the Program Access Rules.

44. The Commission's Program Access rules prohibit unfair methods of competition and unfair or deceptive acts or practices by cable operators, satellite cable programming vendors in which a cable operator has an attributable interest and satellite broadcast programming vendors.[52] They also prohibit undue or improper influence, discrimination in prices, terms or conditions and the use of certain exclusive contracts and practices.[53]

45. The Program Access rules were critical to the successful deployment of DBS. They enabled DBS providers to gain access to essential programming services that otherwise would

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[52] 47 U.S.C.A. §§548, *et seq.*; And See, 47 C.F.R. §76.1000, *et seq.* NRTC was heavily involved in Congress and at the FCC in facilitating the Program Access Rules.

[53] 47 U.S.C.A. §548(b), And See, 47 C.F.R. § 76.1002.

have been unavailable. Without the Program Access rules, it is doubtful that DBS would have developed as a competitive force to cable.

46. The NOI notes that certain provisions of the Program Access rules are scheduled to expire.[54] In particular, on October 5, 2002, the prohibition on cable operators entering into exclusive distribution arrangements with affiliated programming vendors in areas served by cable operators will expire unless extended by the Commission.[55]

47. The Commission's Seventh Report shows that vertically integrated programming services continue to dominate the MVPD market.[56] More than 1/3 of all national programming services are currently vertically integrated with at least one cable Multiple System Operator ("MSO"). At least one of the top five cable MSOs (Time Warner Cable, AT&T Broadband & Internet Services, Comcast Cable Communications, Cox Communications, and Cablevision Systems) holds an ownership interest in each of the vertically integrated national services.[57]

48. The programming services associated with vertical integration are commonly those with the largest number of subscribers and the highest prime time ratings. Currently, nine of the top 20 video programming services in terms of subscribership, and 11 of the top 20 services in terms of prime time ratings, are vertically integrated with cable MSOs.[58] In addition, vertical integration is also common among many regional programming networks, especially regional sports programming.[59]

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[54] NOI, ¶10 (referencing 47 U.S.C. § 548(c)(5)).

[55] 47 U.S.C.A. §548(c)(2)(D), And See, 47 C.F.R. § 76.1002(c)(2).

[56] Seventh Report, at ¶181.

[57] Id. at ¶174.

[58] Id., at ¶175.

[59] Id., at ¶¶183 – 189.

49. Both cable and non-cable MVPDs have reported difficulties in obtaining programming from vertically integrated programmers with exclusive licensing agreements with cable operators. In the Seventh Report, the Commission noted the concern of several non-cable distributors that a "lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business."[60] According to these commenters, "vertically integrated cable operators maintain a high degree of market power that enables them to dominate the programming market."[61]

50. Despite its recent growth, access to vertically integrated programming remains a continuing issue for the expansion of the DBS industry as a competitive force to cable. In the *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, the Commission noted that "large cable operators, because of their size and market share, have overwhelming buying power in the programming market that restricts access to independent programming as well as to vertically integrated programming."[62] The Seventh Report also noted that non-cable MVPDs face difficulties in obtaining programming from vertically integrated cable programmers who continue to make exclusive arrangements with cable operators.[63]

51. Given the powerful status of vertically integrated programmers in the MVPD market and the difficulties both cable and non-cable MVPDs have had in competing with vertically integrated programmers and cable companies with exclusive licensing contracts, NRTC supports the extension of the Program Access rules beyond their scheduled sunset date. The Commission

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[60] Seventh Report, at ¶181 (citing comments of RCN, DIRECTV, WCA, and EchoStar.).

[61] Id.

[62] *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454 (rel. Jan. 2, 2001), at ¶26 (citing to observations made by EchoStar).

[63] Seventh Report, at ¶12.

should not relinquish its authority to review and approve these contracts to ensure that they are in the public interest and will not serve as barriers to competition and diversity in the video programming market.[64]

52. The NOI also seeks comment on a related problem involving efforts by the vertically integrated cable industry to evade the Program Access rules by switching delivery technology from satellite (which is subject to the rules) to cable or terrestrial wireless (which is not).[65] No vertically integrated programmers should be permitted to evade the Program Access rules simply by delivering satellite cable programming to subscribers via terrestrial means.[66] Such duplicity clearly undercuts competition and violates the spirit if not the letter of the Program Access rules. The Commission should extend the Program Access rules to cover any terrestrially delivered programming that was previously delivered via satellite.

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[64] The restriction on exclusive contracts in areas served by cable is not without exception. The Commission has the discretion to approve such contracts if they are in the public interest. In determining whether the exclusive arrangement is in the public interest, the Commission is to consider the effect the contract will have on competition in local and national MVPD markets; the effect the contract will have on non-cable MVPDs; the effect the contract will have in attracting capital investment for new satellite cable programming; the effect of the contract on diversity of programming; and the duration of the contract (See, 47 C.F.R. §76.1002(c)(4)). This provision allows the Commission to protect competition and diversity of programming by monitoring the likely effects of exclusive licensing arrangements.

[65] NOI, ¶52.

[66] Memorandum Opinion and Order, *DIRECTV, Inc., et al, v. COMCAST Corporation, et al, Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, 22 CR 898, 2000 FCC LEXIS 6130, FCC 00-404, (Released November 20, 2000).

III. Conclusion.

NRTC hopes that the Commission's next Cable Competition report to Congress will address the lack of access to programming choices throughout rural America. The Commission should ensure that all Americans -- regardless of their geographic location -- are able to participate fully in the modern video marketplace.

Respectfully Submitted,

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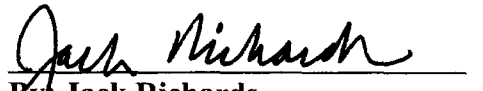

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August 3, 2001

I HEREBY CERTIFY that on this 3rd day of August 2001, a true and correct copy of the foregoing **Comments of the National Rural Telecommunications Cooperative in the Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming** was served via hand delivery upon the following:

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